UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EUGENE MOSS, Plaintiff, v. CAROLYN W. COLVIN, Acting Commissioner of Social Security, Defendant.	CASE NO. C14-0194-RAJ-MAT REPORT AND RECOMMENDATION RE: SOCIAL SECURITY DISABILITY APPEAL

Plaintiff Eugene Moss proceeds pro se, but assisted by his mother, in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this matter be AFFIRMED.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1979.[1] He completed the ninth grade of high school and

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

took some community college classes. (AR 42.) Plaintiff previously worked as a telephone solicitor, security guard, home caregiver, and fast food worker. (AR 29, 66.)

Plaintiff filed his DIB application in November 2011, alleging disability beginning November 2, 2009. (AR 147-48.) His application was denied initially and on reconsideration, and he timely requested a hearing.

On December 11, 2012, ALJ Stephanie Martz held a hearing, taking testimony from plaintiff, a lay witness, and a vocational expert (VE). (AR 36-72.) On February 7, 2013, the ALJ issued a decision finding plaintiff not disabled. (AR 17-31.)

Plaintiff timely appealed. The Appeals Council denied review on December 5, 2013 (AR 1-6), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since the November 2, 2009 alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's depressive disorder, anxiety disorder, and obsessive compulsive disorder severe. Step three asks whether a claimant's impairments meet or equal a listed impairment.

The ALJ found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC to perform a full range of work at all exertional levels, but with the following nonexertional limitations: he is able to understand, remember, and carry out simple routine tasks; he can have occasional brief contact with co-workers and supervisors; he should have no contact with the general public; he needs a routine and predictable work environment; and he works best independently. With that RFC, the ALJ concluded plaintiff was not capable of performing any past relevant work.

If a claimant demonstrates an inability to perform past relevant work or has no past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. The ALJ concluded, with consideration of the Medical-Vocational Guidelines and the assistance of the VE, that plaintiff could perform other jobs existing in significant levels in the national economy, such as work as a housekeeping cleaner, assembler, printed product, and sorter. The ALJ, therefore, concluded plaintiff was not disabled at any time from the November 2, 2009 onset date through the date of the decision.

This Court's review of the final decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred in her consideration of physicians' opinions and the medical evidence, in rejecting his testimony and the testimony of his mother, and in reaching the decision at step five. Plaintiff also argues error in relation to evidence submitted to, but returned by the Appeals Council. He requests remand for an award of benefits or, in the alternative, for further administrative proceedings. The Commissioner maintains the ALJ's decision has the support of substantial evidence and should be affirmed.

Credibility

Absent evidence of malingering, an ALJ must provide clear and convincing reasons to reject a claimant's testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991)). *See also Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "In weighing a claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either in his testimony or between his testimony and his conduct, his daily activities, his work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

The ALJ in this case found that while plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms, his statements concerning the intensity, persistence, and limiting effects of those symptoms were not entirely credible. Contrary to plaintiff's contention, the ALJ provided a number of clear and convincing reasons in support of this conclusion.

A. Failure to Pursue Treatment

The ALJ found plaintiff's pursuit of treatment inconsistent with his allegations as to the extent of his alleged symptoms. (AR 25.) Plaintiff alleged disability beginning in 2009, but did not present for mental health treatment during the relevant period until the end of 2010. (*Id*.; AR 253-70 (AMEN Clinics evaluation by Dr. Amy Lazar).) "Even after this initial presentation, the claimant did not return for six months and this appears to be his only follow up at the clinic." (AR 25; AR 269.) Also, despite numerous recommendations to start psychotherapy and behavioral activation, plaintiff did not begin until April 2012. (AR 25.)

An ALJ appropriately considers an unexplained or inadequately explained failure to seek treatment or follow a prescribed course of treatment. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). Plaintiff asserts he did not pursue treatment due to his lack of resources. (*See, e.g.*, Dkt. 16 at 4.) *See* Social Security Ruling (SSR) 82-59 (failure to follow prescribed treatment may be justifiable where claimant unable to afford); SSR 96-7p (ALJ should not draw inferences from failure to seek or pursue treatment without first considering explanations for that failure, including an inability to afford treatment). However, it appears plaintiff was relying on his mother to support him and did not apply for Medicaid until well after his alleged onset date. (*See, e.g.*, AR 63 and Dkt. 16 at 4-5.) Nor did plaintiff take the

opportunity to make clear to the ALJ that his failure to seek or pursue treatment was due to a lack of resources. *See Molina v. Astrue*, 674 F.3d 1104, 1113-14 (9th Cir. 2012) ("a claimant's failure to assert a good reason for not seeking treatment, 'or a finding by the ALJ that the proffered reason is not believable, can cast doubt on the sincerity of the claimant's pain testimony.'") (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).

Also, other evidence of record provides additional support for the ALJ's conclusion. (*See* AR 246, 249 (plaintiff admitted to "'giving up too soon'" repeatedly in relation to treatment; "He says that during the 1.5 years he did well and kept job he was taking an antidepressant. The reason he went off meds was because 'I was almost manic, talking all the time, bubbly, not myself'"); AR 255 (plaintiff admitted prior use of medications helped and family and friends saw improvement: "[B]ut he feels he might have given up too soon. [H]e reports that now he is ready to make a change and try things for a longer period of time."; "Was first prescribed medication at age 21, but never gave either of them long enough chance to be beneficial."))[2] The Court finds no error in the ALJ's reasoning.

B. Improvement, Inconsistency, and Exaggeration

The ALJ found the record to reveal that, once plaintiff engaged in the recommended treatment, he experienced significant improvement. (AR 25.) She stated:

> Further, the claimant acknowledged partial improvement since the start of Sertraline, but continued to allege debilitating symptoms. However, his testimony and the attorney's contention are at odds with his reports to his clinicians. For example, by June 2012, his panic attacks were significantly less frequent. [(AR 327.)] Contrary to the claimant's testimony at the hearing,

2 This evidence is noted not "to invent a new ground of decision[,]" but to provide "additional support for the . . . the ALJ's position." *Warre v. Comm'r of the SSA*, 439 F.3d 1001,1005 n.3 (9th Cir. 2006).

> that he had one every two to three weeks, the claimant reported to his clinician that he had not had a "bad one" in at least a year. At this time, the claimant was also walking his mother's dog to get exercise. At his August 22nd 2012 appointment, the claimant reported increased energy and improved mood. [(AR 319.)] His clinician noted increased eye contact. Thus, it appears that the claimant's testimony regarding the extent of his symptoms is inconsistent with clinical notes. However, such over estimation of his symptoms is consistent with Dr. Harmon's interpretation of the Personality Assessment Inventory (PAI), which she said was suggestive of possible exaggeration or over reporting of symptoms, though Dr. Harmon also conjectured that these results could be due to feeling overwhelmed. [(AR 363)].

(AR 25.) The ALJ also contrasted plaintiff's allegation of fatigue with evidence indicating his fatigue "may be attributed to his sleep hygiene, rather than his mental impairments." (*Id*.) She noted reports that plaintiff stayed up until four a.m. and slept most of the day, and his later efforts to improve his sleep. (*Id*. (citing AR 286, 307).)

An ALJ properly considers evidence of a claimant's improvement with treatment, inconsistency between a claimant's testimony and the record, and evidence of exaggeration. *See Tommasetti*, 533 F.3d at 1039-40 (favorable response to conservative treatment undermined reports regarding disabling nature of pain), and *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (ALJ appropriately considers inconsistency with the evidence and a tendency to exaggerate). Indeed, "[o]ne strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record." SSR 96-7p.

Plaintiff points to various documents in the record as detracting from the ALJ's conclusions as to improvement and inconsistency. However, "[w]here the evidence is susceptible to more than one rational interpretation, it is the ALJ's conclusion that must be upheld." *Morgan v. Commissioner of the SSA*, 169 F.3d 595, 599 (9th Cir. 1999) (citing

Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995)). To the extent plaintiff takes a contrary view of the evidence, he fails to demonstrate the ALJ's interpretation of the evidence was not equally rational. (*See*, *e.g.*, AR 269 (June 2011: "Eugene is very pleased the Zoloft is working for him. He is less depressed, active, more social and overall doing much better. . . . He is not depressed, still anxious at times but even his family and friends have noticed a huge improvement. He is more outgoing. He has one to two drinks a week socially. He is sleeping well."; "Neatly dressed with good eye contact, alert smiling and appearing so much happier than our first visit last Dec. Speech is calm and clear. Thoughts are organized and linear. Mood is positive, no anxiety. Judgement and insight good."); AR 327 (July 5, 2012: depressed "'pretty much all the time'" but panic attacks better, one to two years ago had "almost 1x week" but has "been at least a year since he has had a 'bad one'"); AR 321 (August 8, 2012: things the same, nothing changed, but "'I think sometimes I sleep too much and that makes me even more tired'; stays up until five or six am, unable to stay asleep for more than one to two hours); AR 316 (August 22, 2012: "increased energy, improved mood and increased eye contact;" "he believes counseling has been beneficial."; still having problems with sleep and makes bad food choices; "Pt rts he enjoys walking his Mo's dog and going for walks alone in the evening when there is 'no one else around'"; social anxiety in public interferes with leaving house, "agreed he should get 'out' more and acknowledges walking to be a healthy and beneficial activity which he would like to do more of."); AR 310-12 (October 5, 2012: medication helping "mood, OCD overall."; "Feeling more outgoing and happy."; some drowsiness during day, sleeping well at night; does not eat healthy, no exercise; "Couch potato, likes TV and computer. Does not like to go outside very much."; "Moderate depression.");

AR 307 (October 8, 2012: "feeling 'better than I have felt in awhile'", taking medications as prescribed, setting alarm to wake up, trying not to take naps, going to bed at eleven or twelve and sleeping through night."))

Plaintiff also takes issue with the ALJ's reliance on evidence of exaggeration, pointing to other parts of the evaluation by Dr. Harmon as reflecting "no indications of any malingering or exaggeration of symptoms." (AR 363 (noting plaintiff seemed to give best effort on testing, with a malingering score indicating good effort and cooperation, and another score indicating "he was being credible and did not endorse unrealistic, unlikely mental health symptoms, even when given the opportunity.")) However, testing by Dr. Harmon also reflected possible exaggeration. (AR 363; *see also* AR 372-73 (PAI testing results suggested plaintiff may not have answered questions in completely forthright manner and may have exaggerated problems, attempted to portray himself in a negative or pathological manner, and presented "with certain patterns or combinations of features that are unusual or atypical in clinic populations but relatively common among individuals feigning mental disorder."; stating clinical hypotheses in report "should be reviewed with these considerations in mind[]" and "clinical scale elevations may overrepresent the extent and degree of significant findings in certain areas.")) The ALJ reasonably considered this evidence and, contrary to plaintiff's contention, explicitly noted Dr. Harmon's clarification that the PAI testing results could have been a reflection of plaintiff "feeling overwhelmed." (AR 25.)[3] The Court finds no error in the ALJ's consideration of

3 The Court declines to address the Commissioner's contention that this evidence constitutes evidence of malingering and obviates the need for clear and convincing reasons to find plaintiff not credible. As the Commissioner notes, the ALJ nonetheless provided a number of clear and convincing reasons in support of her credibility assessment.

evidence of improvement, inconsistency, and exaggeration.

C. Plaintiff's Activities

The ALJ also concluded plaintiff's activities belied his allegations at hearing. She contrasted plaintiff's testimony of difficulty driving with the fact he drove himself to the evaluation by Dr. Harmon. (AR 25 (citing AR 361).) She found plaintiff's testimony that he was overly cautious while driving inconsistent with an intake form indicating he had "many traffic citations, primarily for speeding[.]" (*Id.* (citing AR 257).)

The ALJ contrasted plaintiff's testimony of significant social phobia and rarely leaving the house with evidence he always maintained a roommate and spent time with friends, "though he attempted to downplay exactly how much [time he spent with friends] at the hearing." (*Id.* (citing AR 258).) She compared plaintiff's report he had not been in a relationship since his early twenties with his report to a clinician that he had had ten sexual partners since he was twenty years of age. (AR 25-26; AR 258.) She reasoned: "Such sexual activity indicates a level of social interaction inconsistent with his allegations at the hearing." (AR 26.) The ALJ added that, contrary to his testimony, plaintiff reported to several examining sources that he performed all of his own grocery shopping. (*Id.*; AR 248, AR 272.)

The ALJ further stated:

> Similarly contradictory, the claimant reported that he spent most of his time either watching television or playing poker at a local casino. [(AR 259.)] In August 2012, the claimant reported that he played frequently in satellite poker tournaments around the state when he has enough money. [(AR 321.)] Also in August, the claimant played in a poker tournament, placing 12th out of more than 250 people. [(AR 307.)] He reported that he would like to play in another tournament as soon as he could save some extra money. While the claimant attempted to characterize this outing as a spur of the moment event the result of cajoling by his friends, clinical notes reveal that he had been planning

> to attend this event for weeks and was quite excited by it. Further, while he testified he was not able to repeat it, he clearly communicated to his clinician that he was planning on doing just that if he were able to secure financing. Such activity is contrary to the claimant's allegations that he rarely left his home. It is also contradictory to his claims of lack of concentration and difficulty with socialization discussed below. Furthermore, such an activity is counterintuitive given his alleged phobias regarding germs, crowds, etc.

(AR 26.) (*See also* AR 316 (August 2012: "Pt rts he will be playing in a poker tournament at the end of the month and is looking forward to playing and believes he will do well."); AR 307 (October 2012: "Pt rts he played in a poker tournament at the end of August and placed 12th out of 250+ people and would like to play in another tournament as soon as he can save some extra money."))

The ALJ likewise found inconsistency between plaintiff's allegation of diminished concentration and inability to complete tasks due to his preoccupations and rituals, and evidence in the record. She pointed to plaintiff's ability to routinely complete poker tournaments, at least one involving more than 250 people and where he spent from four to six hours: "Presumably, this would involve numerous hands. It also involves interaction with others and reading social cues, the latter of which the claimant has purportedly struggled." (AR 26.) She also found plaintiff's persistence through various tests, including exhaustive testing by Dr. Lazar, to undermine plaintiff's allegations he is unable to persist and complete even simple tasks. (*Id*. (citing AR 253-70, 344-60 (duplicate).)

There are "two grounds for using daily activities to form the basis of an adverse credibility determination[,]" including (1) whether the activities contradict the claimant's testimony and (2) whether the activities "meet the threshold for transferable work skills[.]" *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603). While plaintiff

denies the evidence of his activities demonstrates his ability to perform in the workplace, the ALJ's reasoning reflects her conclusion that the evidence of plaintiff's activities contradicts his testimony as to the extent of his limitations. Also, while plaintiff points to his own and his mother's testimony in maintaining error in the ALJ's reasoning, he fails to sufficiently address the numerous inconsistencies identified by the ALJ between that testimony and his continuing allegations as to the degree of his limitations. Further, while maintaining the ALJ focused on certain aspects of the record to the exclusion of other evidence, plaintiff himself engages in that practice. For example, while suggesting the ALJ improperly relied on his involvement in a single poker tournament, plaintiff fails to consider the other evidence of record associated with his poker playing. (*See, e.g.*, AR 259 (October 2010: "Most of my time is spent watching tv at home or playing poker at a local casino. If I feel ok then sometimes I will hang out with my brother or my friends."); AR 321-22 (August 2012: "Pt shares he feels 'happy' and enjoys playing strategic games of chess and more recently poker; . . . pt states he enjoys the psychology behind strategic games; the thinking, math, planning are all natural to him; 'I am already thinking 3 moves ahead'; 'No fear attitude' (?); 'Table etiquette' (?), important to follow the rules; pt rts he plays frequently in satellite poker tournaments around the state when he has enough money."; "Pt. plans to play in a big tournament at the end of the month and we will come up with a plan at next appt. to ensure he has enough money to play").)

Nor does the Court find persuasive the various other challenges to the ALJ's consideration of plaintiff's activities. Plaintiff, at best, argues in favor of a contrary interpretation of the evidence without demonstrating the ALJ's interpretation of the record was not rational. Because the ALJ's interpretation of the record is at least equally rational to that

suggested by plaintiff, and because it is well supported by numerous examples, the Court finds no error established.

D. Motivation

The ALJ also found there appeared "to be an element of motivation involved." (AR 26.) "Specifically, the claimant reported that he had 'bounced around in a ton of different jobs, but have never stuck with anything for too long. I have never found anything I really like to do I guess.'" (*Id*. (quoting AR 272 (November 2011 evaluation); *also citing* exhibit 2F (AR 259 (October 2010: "I have never been able to find a job that I really like."))) The ALJ found plaintiff's reports implied he "has not stayed at a job due to his personal preferences, rather than impairment based limitations." (AR 26.) She also found motivation issues in relation to his treatment. She noted, as an example, the fact that plaintiff was able to drive himself to his November 2012 evaluation with Dr. Harmon, that he was taking Sertraline and occasional anxiety medications at that time, and that, despite his allegations regarding infrequent showers, Dr. Harmon noted his adequate hygiene. (*Id*. (citing AR 361-63).) "Thus, the claimant was capable of arriving in a timely manner with appropriate hygiene." (*Id*.)

An ALJ may discount a claimant's testimony due to evidence of self-limitation and lack of motivation. *Osenbrock v. Apfel*, 240 F.3d 1157, 1165-67 (9th Cir. 2001). Also, "[i]n reaching [her] findings, the law judge is entitled to draw inferences logically flowing from the evidence." *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (cited sources omitted).

The ALJ here reasonably considered specific statements made by plaintiff relating to his past work as calling his motivation into question. The ALJ also reasonably contrasted plaintiff's allegations with evidence from his treatment. While plaintiff repeats and elaborates

upon his testimony and the testimony of his mother as to his limitations, he does not demonstrate the ALJ's contrary interpretation of the record is not rational, or that the ALJ otherwise erred in finding his testimony or the testimony of his mother not credible. For this reason, and for all of the reasons stated above, the ALJ's credibility determination should be affirmed.

Lay Testimony

The ALJ addressed the lay witness evidence from plaintiff's mother, Luda Zwilling:

> Zwilling testified that she saw the claimant once or twice per week. She brought him food, ensured that he had showered and brushed his teeth, washed his laundry, ensured he had enough plates and supplies such as toilet bowl cleaner because he did not buy anything. He did not open any envelopes or clean anything. She opined that if she did not do these things for the claimant he would end up on the street. However, the claimant consistently reported to examiners that he had performed his own household tasks and shopping. [(AR 246-52, 271-74.)] There is no report to any examining clinician that chronicles this level of helplessness. She testified that she had encouraged him to go back to work, but was unable to see how he would be able to go to work. Particularly, the claimant smelled bad, showed up late, missed work, and could not perform on the job. This is consistent with the claimant's testimony, but suffers from the same credibility issues described above. I particularly note that the claimant has not been noted to have poor hygiene at clinical appointments, indicating he is capable of maintaining his hygiene when motivated. Ultimately, Ms. Zwilling testified that she worked full time to support her son. She had spent her entire savings and was in financial ruin. It is understandable that the claimant's mother is invested in the claimant attaining social security benefits.

(AR 26-27.)

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). *But see Molina*, 674 F.3d at 1115-22 (describing how the failure to address lay testimony may be harmless). The ALJ can reject the testimony

of lay witnesses only upon giving germane reasons. *Smolen v. Chater*, 80 F.3d 1273, 1288-89 (9th Cir. 1996) (finding rejection of testimony of family members because, *inter alia*, they were "'understandably advocates, and biased'" amounted to "wholesale dismissal of the testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to each individual who testified.") (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).

Plaintiff avers the ALJ did not even consider the function report completed by Zwilling. However, the ALJ acknowledged the report in the decision. (AR 26 (citing AR 180-87).) Plaintiff also contends the ALJ failed to "acknowledge the level of help" his mother provides. (Dkt. 16 at 10.) In fact, the ALJ recognized, but rejected Zwilling's testimony as to the degree of assistance she provided to plaintiff, pointing to inconsistency between her contention and plaintiff's reporting, as well as an absence of any reporting by plaintiff to an examining clinician consistent with Zwilling's testimony. This reasoning was germane. *See Carmickle v. Comm'r of SSA*, 533 F.3d 1155, 1161 (9th Cir. 2008) (inconsistency with activities a germane reason); *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005) (same as to medical record).

The ALJ also noted Zwilling's testimony was consistent with the testimony of plaintiff, but found it to suffer from the same credibility issues identified in relation to plaintiff's testimony. This served as another germane reason for rejecting Zwilling's testimony. *See Molina*, 674 F.3d at 1114 (where ALJ provides germane reasons for rejecting the testimony of one witness, ALJ need only point to those reasons upon rejecting similar testimony offered by a different witness) (citing *Valentine v. Comm'r SSA*, 574 F.3d 685, 694 (9th Cir. 2009)).

Finally, the Court is not persuaded by plaintiff's contention the ALJ erred by improperly speculating as to Zwilling's motives. An ALJ may consider the motivation of a lay witness.

See, e.g., Greger v. Barnhart, 464 F.3d 968, 972 (9th Cir. 2006) (consideration of lay witnesses' "'close relationship'" to claimant and possibility she was "'influenced by her desire to help [him]'" served as reasons germane to lay witness). An ALJ must, however, ensure that the reasoning provided in relation to a lay witness is tied specifically to that witness, as opposed to a broad generalization. *See Valentine*, 574 F.3d at 693-94 ("[I]nsofar as the ALJ relied on characteristics common to all spouses, she ran afoul of our precedents. This does not mean an ALJ must accept the testimony of a spouse who knows little about a claimant's functional capacity. But the ALJ must explain such ignorance in the individual case. Similarly, evidence that a specific spouse exaggerated a claimant's symptoms in order to get access to his disability benefits, as opposed to being an 'interested party' in the abstract, might suffice to reject that spouse's testimony. . . . [W]e remind ALJs to tie the reasoning of their credibility determinations to the particular witnesses whose testimony they reject.") Here, the ALJ properly pointed to specific statements made by Zwilling at hearing as evidencing her personal investment in plaintiff's receipt of disability benefits. (*See* AR 63 ("I exhausted all my earning on, on treatments and doctors. Physically and financially I am in ruins. I'm completely – I don't know – I cannot carry anymore. I need professional help with, with deal. I work full-time and my son works full-time to support him.")) Plaintiff, in sum, does not demonstrate error in relation to the lay evidence.

Medical Evidence

"The ALJ is responsible for resolving conflicts in the medical record." *Carmickle*, 533 F.3d at 1164 (citing *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). *Accord Thomas*, 278 F.3d at 956-57 ("When there is conflicting medical evidence, the Secretary must determine

credibility and resolve the conflict.") (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992)). When evidence reasonably supports either confirming or reversing the ALJ's decision, the Court may not substitute its judgment for that of the ALJ. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

In general, more weight should be given to the opinion of a treating physician than to a non-treating physician, and more weight to the opinion of an examining physician than to a non-examining physician. *Lester*, 81 F.3d at 830. Where not contradicted by another physician, a treating or examining physician's opinion may be rejected only for "'clear and convincing'" reasons. *Id*. (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted by another physician, a treating or examining physician's opinion may not be rejected without "'specific and legitimate reasons' supported by substantial evidence in the record for so doing." *Id*. at 830-31 (quoted source omitted).

Plaintiff argues the ALJ erred in rejecting the opinions of examining physicians Drs. Dana Harmon, David Mashburn, and Cristina Diamonti. As the record contained contrary opinions from nonexamining physicians (*see* AR 79-93), the ALJ was required to provide specific and legitimate reasons for rejecting the opinion evidence.

A. Dr. David Mashburn

Dr. Mashburn evaluated plaintiff on behalf of the Department of Social and Health Services (DSHS) in December 2010. (AR 246-50.) He opined plaintiff's moderate to severe depression would cause deficits in attendance and motivation. (AR 247.) He also noted plaintiff's report of obsessive thoughts and action, opined it "would cause problems fulfilling tasks in timely manner[,]" and deemed this symptom moderate to marked. (AR 247.) Dr.

Mashburn assessed a Global Assessment of Functioning (GAF) rating of 55, indicating moderate symptoms or moderate difficulty in social, occupational, or school functioning. Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) 34.[4]

The ALJ found Dr. Mashburn's conclusions inconsistent with his own examination and the record as a whole, and not persuasive. (AR 27.) She noted plaintiff scored a 29/30 on the mini mental status exam (MMSE) Dr. Mashburn administered, that the record showed plaintiff improved with regular treatment, and that Dr. Mashburn did not observe OCD symptoms personally, "leaving him to rely on the less than credible reports of the claimant." (*Id*.)

The only other objective evidence from the evaluation consists of Dr. Mashburn's observation of depressive symptoms and the Hamilton depression rating scale score, the latter of which is based on plaintiff's reporting in a questionnaire. (*See* AR 247-48, 252.) The ALJ, as such, reasonably pointed to the inconsistency between Dr. Mashburn's opinions and his findings on examination. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005) (rejecting physician's opinion due to discrepancy or contradiction between opinion and the physician's own notes or observations is "a permissible determination within the ALJ's province.") *Cf. Thomas*, 278 F.3d at 957 ("The ALJ need not accept the opinion of any physician, including a treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical findings.")

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4 The most recent version of the DSM does not include a GAF rating for assessment of mental disorders. DSM-V at 16-17 (5th ed. 2013). While the Social Security Administration continues to receive and consider GAF scores from "acceptable medical sources" as opinion evidence, a GAF score cannot alone be used to "raise" or "lower" someone's level of function, and, unless the reasons behind the rating and the applicable time period are clearly explained, it does not provide a reliable longitudinal picture of the claimant's mental functioning for a disability analysis. Administrative Message 13066 ("AM-13066").

The ALJ also, as discussed above, reasonably construed the record as reflecting plaintiff improved with mental health treatment. The ALJ, therefore, reasonably rejected the opinions of Dr. Mashburn based on this inconsistency with the record. *Tommasetti*, 533 F.3d at 1041. (*See also* AR 246, 249 (during Dr. Mashburn's evaluation, plaintiff admitted to "'giving up too soon'" repeatedly in relation to treatment).)

Finally, the ALJ accurately reflected Dr. Mashburn's admission that he did not observe any OCD symptoms. The ALJ provided several clear and convincing reasons for not finding plaintiff entirely credible and reasonably rejected Dr. Mashburn's opinions given the apparent reliance on plaintiff's less than credible reports. *See Bray v. Comm'r of SSA*, 554 F.3d 1219, 1228 (9th Cir. 2009) (where treating physician's work restrictions based on subjective characterization of symptoms and ALJ determined claimant's description of limitations not entirely credible, "it is reasonable to discount a physician's prescription that was based on those less than credible statements.") Plaintiff, for these reasons, demonstrates no error in the ALJ's assessment of the opinions of Dr. Mashburn.

B. Dr. Christina Diamonti

Dr. Diamonti evaluated plaintiff on behalf of DSHS in November 2011. (AR 271-74.) Like Dr. Mashburn, Dr. Diamonti observed depressive symptoms, but not OCD, and assessed a GAF of 55 based on "Client report." (AR 271.) In answering the question as to the effect of current symptoms on the ability to work, Dr. Diamonti stated:

> Mr. Moss reported: 'I am not very efficient at work because I am held back because of the stuff I go through with the OCD. I can't function normally. Tardiness has always been huge. Just waking up is hard. I feel like I never want to wake up. I am always tired, low energy, low mood."

(AR 272.) In summarizing plaintiff's residual capacity, Dr. Diamonti stated:

> Mr. Moss has reported difficulty maintaining gainful employment. Symptoms of depression and OCD interfere with motivation, attendance, punctuality, concentration, and focus. He stated that he becomes easily distracted while at work due to intrusive obsessions, which would interfere with his ability to work with the public or take necessary safety precautions.

(AR 272, 274.) She found plaintiff's prognosis guarded, explaining:

> He reports significant impairment in social and occupational functioning due to lack of motivation, apathy, intrusive thoughts, excessive sleep, and loss of concentration. He has not been able to maintain stable and consistent employment, and indicated inconsistency in his work performance.

(AR 274.)

The ALJ did not find the statements of Dr. Diamonti as to plaintiff's reports of social and occupational functioning persuasive, "as they are merely a transcription of the claimant's allegations," which the ALJ did not find credible. (AR 27.) "An ALJ may reject a treating [or examining] physician's opinion if it is based 'to a large extent' on a claimant's self-reports that have been properly discounted as incredible." *Tommasetti*, 533 F.3d at 1041 (quoting *Morgan*, 169 F.3d at 602). *See also Bray*, 554 F.3d at 1228. Here, as stated by the ALJ, Dr. Diamonti did no more than describe plaintiff's subjective reports.

The ALJ also observed that plaintiff performed well on the MMSE conducted by Dr. Diamonti. While noting the ALJ's failure to acknowledge that he appeared depressed and remembered only two out of three objects after five minutes, plaintiff ignores the remainder of the normal MSE results. (*See* AR 273-74.) The ALJ, therefore, also properly considered inconsistency with Dr. Diamonti's own findings. *See Bayliss*, 427 F.3d at 1216. Finally, the ALJ noted Dr. Diamonti's opinion that plaintiff "would likely benefit from treatment at a

community health center where he can receive ongoing case management, medication oversight, and individual psychotherapy." (AR 28, 273-74.) The consideration of this opinion provides additional support for the ALJ's determination.

C. Dr. Dana Harmon

Dr. Dana Harmon, in November 2012, conducted an examination of plaintiff at the request of plaintiff's attorney at that time. (AR 361-76.) The ALJ described and assessed the opinions of Dr. Harmon as follows:

> . . . I do not find some of Dr. Harmon's opinions regarding the claimant's cognitive and social capacity consistent with the record as a whole. For instance, Dr. Harmon opined that the claimant exhibited problems with concentration and confusion. He also opined that the cognitive weaknesses demonstrated on the [MMSE] would impact his ability to function in a work setting and "would be a significant barrier to his employment or vocational rehabilitation." Thus, he checked various boxes indicating moderate to marked limitations regarding the claimant's ability to make judgments on simple work-related decisions and perform complex tasks. While I have limited the claimant to simple repetitive work, any additional cognitive limitations are not consistent with the record. The claimant scored a 25 on the [MMSE] administered by Dr. Harmon, significantly lower than his performance on this same test two years earlier, when he scored a 29/30. Such a deterioration is inconsistent with the longitudinal record, as the claimant showed demonstrable improvement with treatment as evidenced by clinical notes and the claimant's own admission at the hearing. Dr. Harmon was not privy to such information, as he had not [had] access to any treatment notes.
>
> Dr. Harmon also assessed significant social limitations that do not appear consistent with the longitudinal record. Dr. Harmon noted that the claimant appeared socially isolated and that he had "[particular] difficulty interpreting the normal nuances of interpersonal behavior that provide the meaning to personal relationships," thus he checked all social skills as "severely" limited. However, the claimant was able to maintain relationships with various family members, even living with one of his brothers. He maintained two friendships and, while he alleged contact was infrequent, he had recently attended a poker tournament with his two friends. There is no indication in the record that the claimant acted inappropriate with any medical staff, though, when medicated, his counselor noted that his eye contact increased amongst other signs of improvement. In

> fact, the claimant won 12th place in a poker tournament with over 250 contestants, indicating that he can at least read fellow players better than most. The claimant reported no difficulties working with any co-workers or supervisors in the past, despite having been fired on numerous occasions. I have limited the claimant to no contact with the general public and a routine and predictable environment. The evidence does not support further limitations.

(AR 28, internal citations to record omitted.)

Plaintiff objects to the ALJ's rejection of the opinion evidence from Dr. Harmon, pointing to the multiple tests administered and his opinions, and maintaining the ALJ's assessment of this and the other opinion evidence was irrational. (*See* Dkt. 16 at 7 and Dkt. 18 at 2-3.) The Court, however, finds no error established. The ALJ reasonably found Dr. Harmon's opinions inconsistent with both the medical record and evidence of plaintiff's activities. *Tommasetti*, 533 F.3d at 1041 (inconsistency with the record properly considered), and *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (inconsistency with claimant's level of activity properly considered). She also reasonably considered that Dr. Harmon was not privy to the treatment notes reflecting plaintiff's improvement. The ALJ, as such, provided specific and legitimate reasons for rejecting the opinions of Dr. Harmon.

D. Other Medical Evidence

1. AMEN Clinic and Community Health Clinic:

Plaintiff discusses other medical evidence, including an evaluation from the AMEN clinic and treatment notes from Community Health Clinic. (Dkt. 16 at 4-7.) However, this evidence does not contain any opinions as to plaintiff's functional limitations requiring assessment by the ALJ. *See Turner v. Comm'r of Social Sec. Admin.*, 613 F.3d 1217, 1223 (9th Cir. 2010) (ALJ not required to provide clear and convincing reasons to reject physician's

statement when statement did not assess any limitations). Nor does the Court find any other error established in the ALJ's consideration of this evidence.

2. Dr. Vincent Gollogly:

Plaintiff, in his reply, appears to raise a challenge to the ALJ's consideration of opinion evidence from nonexamining physician Dr. Vincent Gollogly. (Dkt. 18 at 2.) Plaintiff points to Dr. Gollogly's narrative explanation for his opinions as to plaintiff's ability to sustain concentration and persistence: "Able to perform [simple repetitive work]. May need additional time to perform tasks [due to] obsessive thoughts." (AR 90.) Plaintiff asserts: "Not sure why ALJ may reject that testimony, as it is consistent with the medical evidence provided by this claimant." (Dkt. 18 at 2.)

Plaintiff waived any argument relating to the opinions of Dr. Gollogly by failing to raise the issue in his opening brief. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009). In any event, the ALJ considered this evidence from Dr. Gollogly, but did not agree it supported disability. (AR 27.) Specifically, the ALJ noted Dr. Gollogly nonetheless opined plaintiff was capable of performing other work and, thus, "must not have concluded that such additional time would prevent work." (*Id.*) She additionally noted the inclusion in the RFC of a limitation "to a routine and predictable work environment." (*Id.*) The ALJ, as such, properly addressed and accounted for the opinion evidence from Dr. Gollogly.

3. Back pain:

Although not clearly raised as a separate argument, plaintiff takes issue with the ALJ's consideration of his back pain. (*See* Dkt. 16 at 11 (discussing back pain within the context of his credibility); *see also id.* at 3 (asserting the existence of other physical issues during relevant

time period, but clarifying he "does not request those additional impairments to become a part of this claim.")) At step two, the ALJ noted plaintiff had received some treatment for back pain, but that imaging showed no more than mild degenerative changes. (AR 21 (citing AR 279-300, 336).) She stated "this condition appears to have caused no more than mild limitations, as the claimant did not even mention this complaint at the hearing." (*Id*.) The ALJ, as such, did not find a severe back impairment.

Plaintiff denies his back pain caused no more than mild limitations, asserting he "did not have good medical care and was not properly evaluated until 2/2014." (Dkt. 16 at 11.) He states he did not mention his back pain at the hearing "because he wasn't asked by the Judge, and it was a question and answer format[,]" and that his mother did not have enough time to testify and was limited by the ALJ in the testimony she provided. (*Id*.) Plaintiff avers he complained about his back pain on many occasion, notes he is on pain killers, and asserts a variety of limitations imposed by his back pain. (*Id*. at 11-12.)

Neither plaintiff, nor his representative made any mention of physical impairments or limitations at hearing. Although the ALJ did not specifically ask about physical impairments, she did provide plaintiff with opportunities to testify as to limitations imposed by his back, by, for example, asking him to explain why he could not hold down a job (AR 48-49), and why he needed help with chores (AR 53). Also, while the ALJ did clarify she wanted testimony from Zwilling not duplicative of that provided in the functional report (AR 60-61), she did not in any way restrict Zwilling from testifying as to physical impairments. When specifically asked whether she believed plaintiff was capable of returning to work, Zwilling focused exclusively on plaintiff's mental impairments. (AR 63-65.) The ALJ, accordingly, reasonably

considered the absence of any testimony at hearing associated with plaintiff's back pain.

Nor does plaintiff demonstrate error in the ALJ's consideration of the medical evidence associated with his back pain. The ALJ accurately described the objective evidence. (*See, e.g.*, AR 336 (December 2010 x-ray of lumbar spine showing mild scoliosis, probable mild narrowing of disc spaces, mild degenerative changes of facets, and normal mineralization and soft tissues, and diagnosing scoliosis and mild degenerative disc and joint disease).) Further, as discussed above, the ALJ properly discounted plaintiff's testimony, the testimony of his mother, and the medical opinions of record. Plaintiff, therefore, fails to establish error in relation to his back pain at step two or beyond. *See generally Smolen*, 80 F.3d at 1290 ("An impairment or combination of impairments can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more than a minimal effect on an individual's ability to work.'") (quoting SSR 85-28)), and *Miller v. Heckler*, 770 F.2d 845, 849 (9th Cir. 1985) (plaintiff bears the burden of proving that an impairment is disabling).

Evidence Returned by Appeals Council

Plaintiff submitted to the Appeals Council medical records from Dr. Olga Parker dated April 21, 2013 and medical records from Dr. Katerina Riabova dated April 26, 2013 through June 19, 2013. The Appeals Council noted the ALJ decided plaintiff's case through February 7, 2013, found the new information to be about a later time, and concluded the new evidence did not affect the decision about whether plaintiff was disabled beginning on or before February 7, 2013. (AR 2.) The Appeals Council returned the evidence to plaintiff, indicating he would need to apply again for benefits if he wanted consideration as to whether he was disabled after February 7, 2013. (*Id.*) Plaintiff avers error by the Appeals Council, attaches the

evidence from Drs. Parker and Riabova to his opening brief, and maintains this "new and material evidence corroborates the medical evidence as a whole, and supports that [the] ALJ erred in finding [he] was able to work." (Dkt. 16 at 9, 17-31.)

Social Security regulations provide:

> In reviewing decisions based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any new and material evidence only if it relates to the period on or before the date of the administrative law judge hearing decision. If you submit evidence which does not relate to the period on or before the date of the administrative law judge hearing decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application.

20 C.F.R. § 404.976(b)(1). In this case, the Appeals Council found the new evidence did not relate to the period on or before the date of the ALJ decision, did not include the evidence in the record, and returned the evidence to plaintiff as accounted for in § 404.976(b)(1). The evidence is not, therefore, properly considered by this Court as part of the record. *Cf. Brewes v. Comm'r of Social Sec. Admin.*, 682 F.3d 1157, 1162 (9th Cir. 2012) ("The Commissioner's regulations permit claimants to submit new and material evidence to the Appeals Council and require the Council to consider that evidence in determining whether to review the ALJ's decision, so long as the evidence relates to the period on or before the ALJ's decision.") (citing 20 C.F.R. § 404.970(b)).

The Court may consider the evidence from Drs. Parker and Riabova pursuant to "sentence six" of 42 U.S.C. § 405(g).[5] Sentence six provides that the Court may order

5 Given plaintiff's description of this evidence as "new and material" (Dkt. 16 at 9), the Court disagrees with the Commissioner's contention that plaintiff waived any argument that he is entitled to a

additional evidence to be taken before the Commissioner upon a showing that the new evidence is material and there is good cause for the failure to incorporate the evidence into the record in a prior proceeding. 42 U.S.C. § 405(g). To be material, "the new evidence must bear 'directly and substantially on the matter in dispute.'" *Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001) (citation omitted). In addition, the claimant must demonstrate a "'reasonable possibility' that the new evidence would have changed the outcome of the administrative hearing." *Id*. (citation omitted). To demonstrate good cause, the claimant must show the new evidence "was unavailable earlier." *Id*. at 463.

At most, plaintiff maintains the new evidence "corroborates" other evidence rejected by the ALJ. (Dkt. 16 at 9.) He fails to show and the Court does not find a reasonable possibility the new evidence would have changed the outcome of the ALJ's decision. Moreover, even if material, plaintiff fails to show he could not have obtained this evidence earlier. "A claimant does not meet the good cause requirement by merely obtaining a more favorable report once his . . . claim has been denied." *Mayes*, 276 F.3d at 463. *See also Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985) (finding no "good cause" where claimant submitted medical report prepared after hearing, but gave no reason for not soliciting the information sooner). Plaintiff, therefore, fails to justify a sentence six remand or to otherwise demonstrate error.

Step Five

Plaintiff argues the assessed RFC and corresponding hypothetical proffered to the VE did not account for all of his limitations, pointing, in support, to his testimony, the lay witness testimony, and the medical record. However, because the Court finds no error in the

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remand pursuant to "sentence six" of 42 U.S.C. § 405(g). (*See* Dkt. 17 at 24.)

assessment of the testimony or medical evidence and, therefore, the RFC and VE hypothetical, this restating of plaintiff's arguments fails to establish error at step five. *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008).

Plaintiff also points to the VE's testimony as eliminating jobs identified at step five. To the extent the testimony pertained to limitations not included in the RFC, this argument fails for the reason stated above.

Nor does plaintiff demonstrate error in pointing to the VE's testimony as to interactions with supervisors in two of the three jobs identified at step five. The VE testified plaintiff could perform all three jobs identified at step five with an RFC limitation to only occasional, brief contact with supervisors. (AR 66-67.) While the VE agreed on questioning that there may be times in which a supervisor may need to talk to an employee for longer than a minute, such as a five-minute discussion as to a change needed for an assembler job, or an instance in which a supervisor may have a fifteen-to-twenty minute discussion with a housekeeper, he did not disavow his prior testimony that plaintiff could nonetheless perform those jobs with the RFC assessed. (AR 68-71.) Moreover, even if two of the three jobs identified at step five were removed, plaintiff fails to demonstrate that the remaining job of sorter, with 3,820 jobs in Washington and 40,970 jobs in the nation, would not satisfy the ALJ's step five burden. *See, e.g., Gray v. Comm'r of the SSA*, No. 09-35212, 2010 U.S. App. LEXIS 2609 at *63 (9th Cir. Feb. 8, 2010) (even excluding two of three jobs identified by the ALJ, a total of 980 hand bander jobs in Oregon and 59,000 of those jobs in the national economy constituted a significant number of jobs supporting the ALJ's step five finding); *Thomas*, 278 F.3d at 960 (1,300 jobs in Oregon region and 622,000 in the national economy significant). The Court,

therefore, finds no error at step five.

CONCLUSION

This matter should be AFFIRMED.

DATED this 13th day of August, 2014.

Mary Alice Theiler
Chief United States Magistrate Judge